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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 302

CORNELIUS VANDERBILT, JR.,
Petitioner,

—vs.—

PATRICIA W. VANDERBILT,
Respondent,

—and—

THOMAS F. McCOY, Receiver and Sequestrator.

BRIEF OF RESPONDENT PATRICIA W. VANDERBILT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT PATRICIA W. VANDERBILT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT

The parties were married in Connecticut in September, 1948. They then came to live in New York where they resided from time to time (R., fols. 161-162, 195-200). Although they travelled extensively in this country and abroad, they never set foot in the State of Nevada during their married life (R., fols. 1061-1062). In September, 1952, while they were residents of California, petitioner (husband) abandoned the respondent (wife) (R., fols. 383-399). After the abandonment, respondent returned to New York in February, 1953, where she continued to reside up to the present time (R., fols. 402-418).

Respondent is destitute and has been obliged to rely upon charitable assistance in New York [1] for her support.

On March 5, 1953, petitioner purported to establish a residence in Nevada, and on June 30, 1953, he procured a decree of divorce in that state upon constructive service of process.[2] Respondent did not appear, answer or defend the Nevada divorce action, and therefore, the Nevada court did not obtain jurisdiction of the person of the respondent herein.

It is significant to note with respect to the Nevada divorce decree, that:

(1) The complaint was silent on the subject of alimony;

(2) The testimony taken at the hearing of the divorce proceedings contained no reference to the subject of alimony; and

(3) There was no decree as to alimony. (Deft.'s Ex. A; R., fol. 150.)

This action for a separation and maintenance was commenced in the New York Supreme Court in April, 1954, by publication against respondent, the non-resident defendant herein. (In this action respondent is the plaintiff and petitioner is the defendant.) Jurisdiction to make the awards contained in the judgment was based upon the sequestration and seizure of defendant's property within the State of New York.[3]

Defendant appeared specially herein and moved to dismiss the complaint and to vacate the orders for publication and sequestration for lack of jurisdiction of the person of the defendant and the subject of the action. The order entered upon the denial of that motion was not appealed from.[4]

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[1] Petition, A-29: "For the purpose of enforcing the husband's obligation there is interest and jurisdiction in New York enough—more so now that the wife is a public charge in this State."

[2] Deft.'s Ex. A; R., fol. 150.

[3] Pltf.'s Ex. 11; R., fol. 493.

[4] Petition, A-53-A-57.

Thereafter, defendant interposed his answer which included affirmative defenses, and vigorously defended the action on the merits during a trial which consumed seven days.

During the trial, the court ruled in a separate opinion[5] that a separation is barred by defendant's *ex parte* Nevada divorce decree, and continued the trial for the determination of the remaining issues relating to plaintiff's right to maintenance and the amount thereof. After the trial, judgment was rendered denying the separation by reason of the Nevada divorce decree, but awarding maintenance to the plaintiff pursuant to Section 1170-b[6] of the New York Civil Practice Act, which became effective on April 13, 1953.[7]

Significant statements made in the petition without support in the record, merit the attention of this Court.

(1) This is not an *ex parte* action as contended by petitioner. Defendant joined issue herein by service of an answer, and throughout the seven-day trial, his counsel was in attendance and vigorously contested this action on the merits. He cross-examined plaintiff and her witnesses at great length; he objected to the introduction of evidence; and he presented evidence in support of his defenses. His participation was by no means confined to the jurisdictional objections first raised by him.

(2) The complaint was not dismissed at the end of plaintiff's case. The trial court ruled that a separation was barred by reason of defendant's *ex parte* Nevada divorce decree, and dismissed the complaint only with respect to the issues bearing on her right to a separation; however, the trial was continued for the purpose of determining the remaining issues bearing upon plaintiff's right to maintenance as demanded in the complaint.[8]

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[5] Petition, A-34.
[6] Petition, A-57.
[7] Petition, A-37; A-65.
[8] Petition, A-36.

(3) Despite defendant's suggestion to the contrary, there is nothing unnatural or sinister for plaintiff to have made her domicile in New York after defendant's abandonment of her. Plaintiff is not a stranger to New York, having resided there with defendant during their married life for considerable periods of time and on frequent occasions. The Appellate Division made an exhaustive review of the relationship of the parties to New York and their residence there, and found that the parties had a nexus with New York,[9] aside from the fact that plaintiff had established her domicile in New York.

(4) Nevada never was the actual marital domicile of the parties. Despite the fact that defendant gave his residence as Nevada in the Connecticut marriage certificate,[10] the uncontradicted evidence shows that the parties never resided in Nevada as husband and wife.[11]

The use made in the petition of references to the prior separation action, and the denial of an injunction in that action is misleading, because both are wholly irrelevant to this action. The prior action was commenced on October 1, 1952, and was dismissed on February 27, 1953, solely on the jurisdictional ground that the statutory residential requirements had not been established as of the date of the commencement of that action.[12] The injunction sought by plaintiff in the prior action to enjoin defendant's prosecution of the Nevada action was denied on July 3, 1953 for the two-fold reason that the action had already been dismissed for lack of jurisdiction, and that the Nevada action had already proceeded to judgment on June 30, 1953, thus rendering moot the motion to enjoin the prosecution thereof.[13]

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[9] Petition, A-28; A-29.
[10] Pltf.'s Ex. 1; R., fol. 159.
[11] R., fols. 1061-1062.
[12] Deft.'s Ex. G; R., fol. 895.
[13] Deft.'s Ex. H; R., fol. 910.

ARGUMENT

POINT I

NEVADA DID NOT ADJUDICATE ON THE SUBJECT OF ALIMONY. HENCE, THE AWARD OF ALIMONY BY NEW YORK PRESENTS NO QUESTION UNDER THE FULL FAITH AND CREDIT CLAUSE.

The decision of this Court in *Armstrong* v. *Armstrong*, 350 U. S. 568, is controlling that no question is here presented under the full faith and credit clause of the Constitution.

In the *Armstrong* case, the husband obtained a divorce in Florida, where the complaint, the master's report and the decree referred to the subject of alimony, but the decree awarded no alimony to the wife. Subsequently, in a suit by the wife in Ohio, the Ohio court rendered a decree recognizing the validity of the Florida divorce decree, but awarded maintenance to the wife. On certiorari, this Court held that there was no adjudication by the Florida court with respect to alimony, and that in the absence of such adjudication, a subsequent award of alimony by the Ohio court presented no question to be determined by this Court as to whether full faith and credit was denied the Florida divorce decree.

In the case at bar, an *a fortiori* situation is presented by reason of the fact that the judgment roll of the Nevada action shows that the complaint, the evidence at the trial, the findings and the decree are all silent on the subject of alimony.[14] The Nevada divorce decree adjudicated the marital status only—it did not adjudicate either a grant or denial of alimony. Hence, the Nevada court made no decree as to alimony.

The Nevada court, not having adjudicated on the absent wife's right to maintenance, its decree was accorded full faith

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[14] Deft.'s Ex. A; R., fol. 150.

and credit by New York when it upheld the decree as a valid adjudication as to the marital status. In awarding maintenance to the wife in this action, New York adjudicated upon a right which the Nevada court did not consider nor decide.

It is evident, therefore, that upon the authority of the *Armstrong* case no federal constitutional question is presented here with respect to the full faith and credit clause.

POINT II

ASSUMING, ARGUENDO, THAT THE NEVADA COURT ADJUDICATED AND DENIED ALIMONY TO THE WIFE, THE FULL FAITH AND CREDIT CLAUSE WAS NOT VIOLATED, BECAUSE NEVADA LACKED JURISDICTION OF THE PERSON OF THE WIFE.

Concededly, the husband's divorce decree was an *ex parte* decree, based upon constructive service of process, and without jurisdiction having been obtained of the person of the wife.

It has long been the constitutional rule that the personal rights of an absent non-resident cannot be affected without personal service of process within the state of the forum, or an appearance equivalent thereto. (*Pennoyer* v. *Neff*, 95 U. S. 714.)

This Court, in *Estin* v. *Estin*, 334 U. S. 541, held that the rights of a wife to alimony derived from a New York separation judgment could not be extinguished or altered by a subsequent *ex parte* divorce judgment rendered in Nevada, wherein personal jurisdiction of the wife was not obtained.

The only difference between the facts in the *Estin* case and those presented here is, that here, the wife, a domiciliary of New York, had not procured a judgment for alimony prior to the rendition of the Nevada *ex parte* divorce decree in favor of the husband.

Plaintiff's right to support, unreduced to judgment, like Mrs. Estin's right to support after judgment, is the kind of

personal right which cannot be adjudicated without personal jurisdiction having been first acquired over her.[15]

There can be no distinction, in law or in reason, between a legal right, prior to judgment, and such right after judgment, insofar as concerns the protection thereof under the due process clause. Both are personal rights which cannot be altered, extinguished or divested without due process of law. Lacking *in personam* jurisdiction of the wife, the Nevada court could not, by its *ex parte* judgment, constitutionally extinguish her personal right to maintenance.

Thus, if we assume that the Nevada court considered the question of alimony and decided the question adversely to the wife, it lacked the jurisdictional power to adjudicate on that personal right of the wife. The full faith and credit clause does not compel New York to recognize an adjudication by Nevada on a matter which Nevada did not have jurisdiction to decide.[16]

POINT III

SECTION 1170-b OF THE NEW YORK CIVIL PRACTICE ACT PERMITTING AN AWARD OF MAINTENANCE TO THE WIFE AFTER AN EX PARTE DIVORCE IN FAVOR OF THE HUSBAND DOES NOT IMPAIR ANY CONTRACTUAL RIGHTS OF THE HUSBAND.

Defendant makes the unsound claim that Section 1170-b imposes upon him a new marital obligation.

Defendant's obligation to support plaintiff, and her right to be supported by him, springs, not from any statute, but from the marriage itself.[17] We have already shown that it is

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[15] *Cf. May* v. *Anderson*, 345 U. S. 528; see *Hopson* v. *Hopson*, 221 Fed. (2nd) 839, 844.

[16] *Williams* v. *North Carolina*, 317 U. S. 287, 325 U. S. 226; *Esenwein* v. *Esenwein*, 317 U. S. 207; *Kreiger* v. *Kreiger*, 334 U. S. 555; *Barber* v. *Barber*, 21 How. 582; *Barrett* v. *Failing*, 111 U. S. 523, 525.

[17] *Garlock* v. *Garlock*, 279 N. Y. 337, 340; *Haas* v. *Haas*, 298 N. Y. 69, 71.

the prevailing law that plaintiff's right to maintenance was not extinguished by defendant's *ex parte* divorce decree obtained without personal jurisdiction over her. Section 1170-b, therefore, did not impose any obligation, retroactively or otherwise, which defendant did not already have before that statute was enacted. The statute merely permitted plaintiff to enforce the unextinguished existing obligation of defendant to support her.

New York has the right to declare that the unextinguished obligation of defendant to support plaintiff, a domiciliary, may be enforced after the rendition of the husband's *ex parte* divorce decree. In enacting Section 1170-b, the New York Legislature established that it is the public policy of New York that the support obligation survives an *ex parte* divorce obtained by the husband without personal jurisdiction of the wife, and it also established the procedure for the enforcement of that obligation. The court below, in affirming the judgment, leaves no doubt that such is the public policy of New York today, regardless of what may have been its policy in the past.[18]

POINT IV

SECTION 1170-b IS NOT DISCRIMINATORY.

Defendant erroneously contends that Section 1170-b is directed only against *ex parte* ivorces obtained in other states, and that the statute would not be applied to such divorces obtained in the State of New York. On the basis of that false premise defendant concludes that the statute is discriminatory and unconstitutional.

The statute is clear and unambiguous, applying with equal effect to divorce decrees obtained (without personal jurisdiction of the wife) in the State of New York, as well as those rendered in other states. In fact, this statute was drafted with special regard to avoid such discrimination, as appears

[18] Petition, A-9.

from the Report of the New York Law Revision Commission which recommended the enactment of that statute by the New York Legislature.[19]

Moreover, the court below, in construing that statute, has held that the statute is non-discriminatory, stating (Petition, A-8):

> "As to defendant's first assumption, there is nothing in our statute to support the conclusion that it is inapplicable where the prior judgment was obtained in New York."

In determining the constitutionality of a state statute, the interpretation placed upon such statute by the highest court of that state is controlling.[20] The construction placed upon the statute by the court below clearly overcomes defendant's specious claim of discrimination.

POINT V

BY VIRTUE OF PLAINTIFF'S DOMICILE IN NEW YORK, THE COURT BELOW HAD JURISDICTION TO RENDER JUDGMENT HEREIN IN ACCORDANCE WITH THE PUBLIC POLICY AND LAWS OF THE STATE OF NEW YORK.

Defendant makes the fallacious argument that because New York is not the matrimonial domicile of the parties, it lacked jurisdiction to render the judgment herein in accordance with the laws of the State of New York.

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[19] (Leg. Document (1953) No. 65(K)): "In order to avoid discrimination against foreign divorces against which the Estin opinion warned, such legislation should be made applicable whether the husband's *ex parte* adjudication of marital status was obtained in a foreign or a New York court."

[20] *State of Minnesota* v. *Probate Court*, 309 U. S. 515; *Supreme Lodge* v. *Meyer*, 265 U. S. 30, 32.

Although the parties resided in California at the time of the abandonment, thereafter, the abandoned plaintiff established a domicile for herself in the State of New York. The trial court and the Court of Appeals found that plaintiff was domiciled in the State of New York.[21]

Under the well-recognized rule, plaintiff, upon being abandoned, had the right to establish her own domicile in New York, and in doing so, New York acquired jurisdiction to determine her marital rights in accordance with its own laws and public policy.[22]

After having abandoned the plaintiff in California, defendant himself established a unilateral domicile in Nevada, upon which he rests the jurisdictional basis for the divorce decree which is now urged by him as a defense in this action.

If unilateral domicile of the husband is sufficient to confer upon Nevada the jurisdictional basis to render a valid divorce in accordance with its own laws, by the same token, New York, with the same jurisdictional basis, had jurisdiction to render the judgment herein in accordance with *its* laws. The rule of jurisdiction and the applicability of the law of the forum, must be consistently applied to both judgments.

Defendant makes the untenable claim that plaintiff had no right, under the New York statute, to maintain this action. The trial court found that plaintiff was a domiciliary and resident of this state for more than one year prior to the commencement of this action. That court also found that she was a resident of this state at the time when Section 1170-b became effective.[23]

The question as to whether or not plaintiff brought herself within the provisions of the New York Civil Practice Act governing her eligibility to maintain this action, is a procedural

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[21] Petition, A-8, A-38.

[22] *Williams* v. *North Carolina*, 317 U. S. 287, 325 U. S. 226; *Hunt* v. *Hunt*, 72 N. Y. 217, 242, 243; *Dean* v. *Dean*, 241 N. Y. 240, 244; *Daggett* v. *Daggett*, 255 N. Y. 243, 247.

[23] Petition, A-46.

matter which is purely a state and not a federal question.[24] The courts below having made such determination in favor of the plaintiff, such determination is not a proper subject for review by this Court.

POINT VI

THE REMAINING CONTENTIONS RAISED BY DEFENDANT LIKEWISE RAISE NO FEDERAL CONSTITUTIONAL QUESTION.

Defendant was not deprived of a fair trial.

Defendant makes the baseless claims that the complaint was dismissed at the close of plaintiff's case and that he had no opportunity to answer the charges of his misconduct. Such claims are belied by the fact that defendant's attorney spent every day of the seven-day trial exerting every effort to obtain a judgment favorable to the defendant, not only on jurisdictional grounds, but also on the facts as well as on the merits.

The record shows that the complaint was not dismissed at the close of plaintiff's case. The trial court ruled that a separation was barred by the Nevada *ex parte* decree, and continued the trial for the purpose of determining the remaining issues relating to plaintiff's right to maintenance and the amount thereof.[25]

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[24] *Central Vermont Ry. v. White*, 238 U. S. 507, 511, where this Court stated: "It is settled law that a decision resting on State procedure on matters affecting the remedy sought to be enforced are governed by the law of the forum, and a decision of a State court on matters of State pleadings or practice is not reviewable by this court and does not present a federal question."

[25] Petition, A-36: "The first affirmative defense of the defendant, therefore, is a bar to the plaintiff's action for a separation, and, being sustained, the complaint bearing on this issue must be dismissed upon the merits.

* * * * *

After the ruling above referred to was made, the trial was resumed, and on at least three separate occasions thereafter, the trial court informed defendant's counsel that he was at liberty to adduce any evidence that he desired to bring to bear on the issue of maintenance, if any, to be awarded to plaintiff.[26]

Defendant made similar arguments below in the Appellate Division and in the Court of Appeals. Both courts found that there was nothing in the record to support such claims.[27]

Defendant had adequate notice of this action which fully satisfied the requirements of due process.

All of the essentials for due service upon defendant by publication were fully complied with, and defendant has made no attack on the sufficiency of the order for publication nor on the manner the service of process was made pursuant thereto.

There has been compliance with all requirements of due process because service by publication effectively gave notice to defendant of the commencement of this action and afforded him an opportunity to defend. (*Mullane* v. *Central Hanover Bank & Trust Company*, 339 U. S. 306.)

In addition to the notice to defendant of the commencement of this action afforded by publication, defendant received additional notice when his property was seized under the

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"However, pursuant to the provisions of the statute particularly and specifically section 1170-b of the Civil Practice Act, in cases such as this made and provided, I will take the proof from both parties as to their incomes and earnings, and such other information as may be required and pertinent in connection with the issue of maintenance and support to be awarded, if any, to the plaintiff."

[26] R., fols. 1346, 1347, 1349, 1370.

[27] Petition, A-10, A-22. The Appellate Division stated (A-22n): "On this appeal the husband contends that he had no opportunity to meet these issues, but that is not so. The trial court clearly indicated that after it would decide the motion to dismiss at the close of the wife's case, the husband could meet any issues that he considered relevant."

order of sequestration.[28] In *Granis* v. *Ordean*, 234 U. S. 385, this Court stated (394):

> "The fundamental requisite of due process is the opportunity to be heard."

The best evidence that there is no lack of due process here, and that defendant had ample notice and full opportunity to be heard, is found in the fact that the order for publication was signed on April 21, 1954, and on April 30, 1954, defendant's attorney served a notice of appearance. Thereafter, he served an answer and his counsel actively participated throughout the trial.

The Court of Appeals reviewed this claim of lack of due process, and ruled that it was without merit. That court held that adequate notice was given to the defendant by the complaint and by the statute itself which "warned that if a separation should be refused because of the foreign divorce judgment, maintenance might still be awarded."[29]

It is nothing short of sheer nonsense for the defendant to urge lack of due process, after he has had actual notice of every stage of this action; after he has had a full opportunity to defend; and after he has most vigorously defended this action every inch of the way.

The finding of misconduct is warranted by the record and was not precluded by the ex parte Nevada divorce decree.

Defendant contends that the Nevada judgment was conclusive on the merits as to everything but jurisdiction, and suggests that error was committed by the finding of misconduct on the part of the defendant.

Defendant cites no authority in support of that claim. The prevailing law is to the contrary. The Nevada action was

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[28] *Mathews* v. *Mathews*, 247 N. Y. 32; *Geary* v. *Geary*, 272 N. Y. 390.
[29] Petition, A-10.

in rem, without personal jurisdiction over the absentee wife. The effect of any finding of fact made by the Nevada court is limited to the *res* before the court, and is not personally binding upon the absentee wife, nor is it conclusive upon her in any subsequent litigation between the parties. The court below so held in accordance with firmly established law.[30]

The court below has interpreted the phrase, "as justice may require," [31] contained in Section 1170-b, as conferring a power upon the New York Supreme Court, consistent with the broad and comprehensive powers of that court, preserved by the State Constitution and the Civil Practice Act.[32] The objection raised by defendant with respect to that statute does not present a federal question.[33]

CONCLUSION

FOR THE REASONS ADVANCED, THE PETITION SHOULD BE DENIED.

Respectfully submitted,

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Of Counsel:
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CHARLES L. RASKIN.

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[30] Petition, A-9. *Durant* v. *Abendroth*, 97 N. Y. 132, 141; *Matter of Holmes*, 291 N. Y. 270, citing Restatement of Judgments, Sec. 74.

[31] Petition, A-10.

[32] New York State Constitution, Art. 6, Sec. 1; New York Civil Practice Act, Sec. 64.

[33] *State of Minnesota* v. *Probate Court*, 309 U. S. 515, 525: "This construction is binding upon us. Any contention that the construction is contrary to the terms of the Act is unavailing here. For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest court of the State has interpreted it."